

NO.

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DATED this 25th Day of October, 2007.

NORTHERN MORaine WASTEWATER
RECLAMATION DISTRICT

By: 
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Exhibit A

NO. _____
**IN THE APPELLATE COURT OF ILLINOIS
FOR THE SECOND DISTRICT**

Northern Moraine Wastewater)	
Reclamation District,)	
)	
Petitioner,)	Petition for Review
)	of Order of the
)	Illinois Commerce Commission
v.)	in ICC Docket Nos. 06-0522 and
)	06-0523 (consolidated)
Illinois Commerce Commission,)	
Rockwell Utilities, LLC,)	
)	
Respondents.)	

WRITTEN NOTICE OF APPEAL

TO: Elizabeth Rolando, Chief Clerk
Illinois Commerce Commission
527 East Capitol Avenue
Springfield, IL 62701

Northern Moraine Wastewater Reclamation District (the "District") herewith gives written notice of its Petition for Review of the September 28, 2007 Order On Rehearing of the Illinois Commerce Commission ("Commission"), and the related Final Order of the Commission entered on August 15, 2007 in Commission Docket Nos. 06-0522 and 06-0523 (consolidated), pursuant to Section 10-201(b) of the Illinois Public Utilities Act (220 ILCS 5/10-201(b) and Illinois Supreme Court Rule 335.

WHEREFORE, the District is appealing the September 28, 2007 Order On Rehearing and the related Final Order of August 15, 2007 in Commission Docket Nos. 06-0522 and 06-0523 (consolidated) to the Appellate Court of Illinois for the Second District, for the purpose of having the reasonableness and lawfulness of same inquired into and determined.

DATED this 25th Day of October, 2007.

NORTHERN MORAINÉ WASTEWATER
RECLAMATION DISTRICT

By: Laura A. O'Connell

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)	06-0523 (consolidated)
Illinois Commerce Commission,)	
Rockwell Utilities, LLC,)	
)	
Respondents.)	

NOTICE OF FILING OF NOTICE OF APPEAL

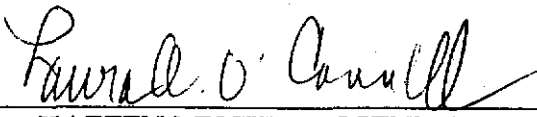
TO: All Parties on the Attached service List

PLEASE TAKE NOTICE that on the 25th day of October 2007, the attached Written Notice of Appeal was filed with the Clerk of the Illinois Commerce Commission, 527 East Capitol Avenue, Springfield, Illinois 62701, on behalf of Northern Moraine Wastewater Reclamation District in Commission Docket Nos. 06-0522 and 06-0523 (consolidated).

DATED this 25th Day of October, 2007.

NORTHERN MORaine WASTEWATER
RECLAMATION DISTRICT

By: _____


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CERTIFICATE OF SERVICE

I, Laura A. O'Connell, an attorney, certify that I caused copies of the foregoing Northern Moraine Wastewater Reclamation District's **Notice of Filing of Notice of Appeal and Written Notice of Appeal** to be served upon the parties identified on the attached Service List by U.S. mail (postage prepaid) before 5:00 p.m. on October 25, 2007.

A handwritten signature in cursive script, appearing to read "Laura A. O'Connell", written over a horizontal line.

Laura A. O'Connell

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Exhibit B

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Rockwell Utilities, LLC	:	06-0522
	:	
Petition for a Certificate of Public	:	
Convenience and Necessity to	:	
provide water and sanitary sewer	:	06-0523
service to parcels in Lake County,	:	
pursuant to Section 8-406 of the	:	
Public Utilities Act.	:	Consol.

ORDER

Dated: August 15, 2007

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STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Rockwell Utilities, LLC	:	06-0522
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Petition for a Certificate of Public	:	
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provide water and sanitary sewer	:	06-0523
service to parcels in Lake County,	:	
pursuant to Section 8-406 of the	:	
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ORDER

By the Commission:

I. Procedural History; Background; Relief Sought

On July 24, 2006, Rockwell Utilities, LLC ("Rockwell", "Petitioner", or "Company") filed a Petition with the Illinois Commerce Commission ("Commission") for a Temporary Certificate of Public Convenience and Necessity ("Temporary Certificate"), pursuant to Section 8-406(e) of the Act, 220 ILCS 5/8-406(e), to provide water and sanitary sewer services to various parcels located within the Village of Lakemoor ("Village") in Lake County, Illinois (the "subject area"). Docket 06-0523. The Commission granted Rockwell's request for a Temporary Certificate in its August 16, 2006 Interim Order. The Company also filed a Petition pursuant to Section 8-406 of the Act requesting permanent certification ("Permanent Certificate") of the subject area. Docket 06-0522. Rockwell also seeks approval of Affiliated Interests Agreements. The two dockets were consolidated by the Administrative Law Judge on August 7, 2006.

Pursuant to due notice, hearings were held before duly authorized Administrative Law Judges of the Commission at its offices in Chicago, Illinois. A Petition for Leave to Intervene was filed by the Northern Moraine Wastewater Reclamation District (the "District") on August 31, 2006, which was subsequently granted. Appearances were entered for the Company, the District, and Commission Staff ("Staff") by their respective counsel. Municipalities located within 1½ miles of the areas in question were provided a copy of the Petition in Docket 06-0522 in accordance with 83 Ill. Adm. Code 200.150(b), and were served notice of the initial hearing.

On April 16, 2007, Rockwell filed a Revised Amended Petition for Certificate of Public Convenience and Necessity and Approval of Affiliated Interests Agreements ("Revised Amended Petition") in Docket 06-0522. In its Revised Amended Petition,

Petitioner requests that the Commission: (1) grant a Permanent Certificate authorizing Rockwell to provide water and sanitary services to the subject area; (2) approve the general terms and conditions for service for the subject area; (3) approve the accounting entries related to the acquisition by Rockwell of the water and sewer facilities in the subject area; (4) approve certain affiliated interest agreements; (5) authorize the Company's initial equity and debt financing; and (6) authorize Rockwell's refinancing of certain debt.

Pursuant to the schedule set by the Administrative Law Judge, on May 30, 2007 both Rockwell and Staff filed Motions to Strike all or parts of the direct and rebuttal testimony of District witness Kenneth Michaels, Jr., the rebuttal testimony of District witness George Roach and a portion of District witness Robert Scott Trotter's rebuttal testimony. The Motions were granted by the Administrative Law Judges on June 8, 2007. No interlocutory appeal of that ruling was filed by the District.

At the hearing on June 1, 2007, John P. Carroll, Jeremy C. Lin, Michael Albach, and David R. Monie testified on behalf of the Company. George O. Roach and Robert Scott Trotter testified on behalf of the District. Thomas Q. Smith, an Economic Analyst in the Water Department of the Financial Analysis Division; Janis Freetly, a Senior Financial Analyst in the Finance Department of the Financial Analysis Division; Mike Luth, a Rates Analyst in the Rates Department of the Financial Analysis Division; Mary H. Everson, an Accountant in the Accounting Department of the Financial Analysis Division; and William R. Johnson, an Economic Analyst in the Water Department of the Financial Analysis Division, all provided testimony on behalf of Staff. At the close of the June 1, 2007 evidentiary hearing, the record was marked "Heard and Taken."

II. Applicable Statutory Authority

A. Section 8-406 of the Act

Section 8-406 of the Act, 220 ILCS 5/8-406, provides the criteria upon which the Commission must base its determination regarding whether it should grant Rockwell a Permanent Certificate for the subject area. Section 8-406 of the Act provides, in relevant part, as follows:

(a) No public utility. . . shall transact any business in this State until it shall have obtained a certificate from the Commission that public convenience and necessity require the transaction of such business.

* * *

(b) No public utility shall begin the construction of any new plant, equipment, property or facility which is not in substitution of any existing plant, equipment, property or facility or any extension or alteration thereof or in addition thereto, unless and until it shall have obtained from the Commission a certificate that public convenience and necessity require such construction. Whenever after a hearing the Commission determines that any new construction or the transaction of any business by a public utility will promote the public convenience and is necessary thereto, it shall

have the power to issue certificates of public convenience and necessity. The Commission shall determine that proposed construction will promote the public convenience and necessity only if the utility demonstrates: (1) that the proposed construction is necessary to provide adequate, reliable, and efficient service to its customers and is the least-cost means of satisfying the service needs of its customers; (2) that the utility is capable of efficiently managing and supervising the construction process and has taken sufficient action to ensure adequate and efficient construction and supervision thereof; and (3) that the utility is capable of financing the proposed construction without significant adverse financial consequences for the utility or its customers.

B. Section 7-101 of the Act

Section 7-101 of the Act, 220 ILCS 5/7-101, requires Commission approval of affiliated interest agreements. Section 7-101(3) provides, in relevant part, as follows:

(3) No management, construction, engineering, supply, financial or similar contract and no contract or arrangement for the purchase, sale, lease or exchange of any property or for the furnishing of any service, property or thing, hereafter made with any affiliated interest, as hereinbefore defined, shall be effective unless it has first been filed with and consented to by the Commission or is exempted in accordance with the provisions of this Section or of Section 16-111 of this Act. The Commission may condition such approval in such manner as it may deem necessary to safeguard the public interest. If it be found by the Commission, after investigation and a hearing, that any such contract or arrangement is not in the public interest, the Commission may disapprove such contract or arrangement. Every contract or arrangement not consented to or excepted by the Commission as provided for in this Section is void.

C. Section 6-102 of the Act

Section 6-102 of the Act, 220 ILCS 5/6-102, requires Commission authorization of debt refinancing. Section 6-102 provides, in relevant part, as follows:

(a) Subject to the provisions of this Act and of the order of the Commission issued as provided in this Act, a public utility may issue stocks and stock certificates, and bonds, notes and other evidences of indebtedness payable at periods of more than 12 months after the date thereof for any lawful purpose. However, such public utility shall first have secured from the Commission an order authorizing such issue and stating the amount thereof and the purpose or purposes to which the issue or the proceeds thereof are to be applied, and that in the opinion of the Commission, the money, property or labor to be procured or paid for by such issue is reasonably required for the purpose or purposes specified in the order.

* * *

(d) Any issuance of stock or of bonds, notes or other evidences of indebtedness, other than issuances of notes pursuant to subsection (c) of this Section, which is not subject to subsection (b) of this Section, shall be regulated by the Commission as follows: the public utility shall file with the Commission, at least 15 days before the date of the issuance, an informational statement setting forth the type and amount of the issue and the purpose or purposes to which the issue or the proceeds thereof are to be applied. Prior to the date of the issuance specified in the public utility's filing, the Commission, if it finds that the issuance is not subject to subsection (b) of this Section, shall issue a written order in conformance with subsection (a) of this Section authorizing the issuance. Notwithstanding any other provisions of this Act, the Commission may delegate its authority to enter the order required by this subsection (d) to a hearing examiner.

III. Rockwell's Request and Evidence

Rockwell provided testimony that before Lakemoor Building Corporation's ("Lakemoor") assets were acquired by Rockwell, Lakemoor and its agents and assigns, constructed and operated a private water and sanitary sewer system (the "System") in the Village. From 1987 to January 5, 2007, the Illinois Environmental Protection Agency ("IEPA") granted Lakemoor permits to construct and operate the System. This System is the subject of Rockwell's Revised Amended Petition. On January 19, 2006, Rockwell entered into an Agreement for the Sale of Sewer and Water System ("Asset Purchase Agreement") with Lakemoor to purchase the water and wastewater assets that Lakemoor was using to provide private water and sewer service.

According to Rockwell, the proposed service territory consists of certain real estate commonly referred to as the "Sullivan Lakes Parcel," of which an affiliate of Rockwell is the owner and/or contract purchaser. The service territory also consists of certain real estate owned by JRC Lakemoor Investments Limited Partnership ("Jupiter Investments") and JRC Lakemoor Development Company, LLC ("Jupiter Development") (Jupiter Investments and Jupiter Development are hereinafter referred to collectively as "Jupiter") that is located adjacent to the System and commonly known as The Meadows Apartments (or the "Apartment Project"). The service territory also includes other real estate owned by Lakemoor and its affiliates. All of the property that Rockwell proposes to serve is contained within the Village. The territory Rockwell seeks to serve has been clarified and is set forth in the Rebuttal Testimony of John P. Carroll. Rockwell Ex. 5.0, JPC 5.1.

Although the IEPA issued multiple permits to Lakemoor to construct and operate the System, Rockwell states that one of Lakemoor's operating permits was to expire on July 31, 2006, and the IEPA cited Lakemoor for failing to use a certified operator and for failure to properly monitor and report on the System. Based on the Asset Purchase Agreement, Rockwell's obligation to purchase the System was contingent upon the

issuance of appropriate Commission and IEPA certifications. Over the course of several months, Rockwell worked with the IEPA and Lakemoor to bring the facility into IEPA compliance and the IEPA has approved Rockwell's permit to operate the facilities. On January 4, 2007, Rockwell completed the acquisition of the System and commenced operation under its Temporary Certificate issued by the Commission.

Rockwell maintains that it acquired the System for a purchase price that is equal to the Available Capacity of the System multiplied by \$5,000.00 but not to exceed \$3,535,000.00 as set forth in Paragraph 2(a) of the Asset Purchase Agreement. The Available Capacity is equal to the number of homes in the Area that may be served by the System as determined by the IEPA and/or the Commission over time. As such, at closing, Rockwell made a down payment to Lakemoor of \$1,825,000 with a letter of credit for \$1,710,000, totaling the maximum purchase price.

In addition, at closing, Rockwell states that Lakemoor assigned to Rockwell a Sanitary Sewer and Water Service and Tap-On Agreement dated July 13, 1998, between Lakemoor and Jupiter Development, ("Jupiter Agreement") which provides for Rockwell to provide water and sewer service to real estate owned by Jupiter that is adjacent to the System and is commonly known as The Meadows Apartments (the "Apartment Project"). The Jupiter Agreement also provides for a credit to the purchase price payable to Lakemoor. Pursuant to Paragraph 10 to the Jupiter Agreement, Jupiter Development is to pay Rockwell, as the assignee for Lakemoor, \$2,000.00 for each additional apartment unit developed plus \$300.00 for each excess bedroom in such additional units as set forth in Subparagraphs 10(a)(i) and (ii). In turn, pursuant to Paragraph 5 of the Asset Purchase Agreement, Rockwell is to pay Lakemoor 50% of such payments from Jupiter Development. Rockwell is to retain the remaining 50% of such payments received from Jupiter Development as a credit to the purchase price.

Further, Rockwell showed that the Village has approved for development the parcels that are contained within Rockwell's proposed service territory. As the evidentiary record shows, the Village anticipated the parcels within the proposed service territory would obtain water and sewer services from the System, and not the Village or any other service provider. Rockwell Ex. 1.0R, JPC-1.4

Rockwell provided evidence that the System consists of both water and sewer assets. The water system assets consist of (a) a water treatment facility, (b) one million gallon elevated storage tank, (c) three wells, (d) three pumps, (e) approximately 13,745 linear feet of mains of various sizes along with related valves, and (f) fittings, blow-offs and fire hydrants. The sewer system assets include (a) a wastewater treatment facility, (b) approximately 10,082 linear feet of mains of various sizes along with related valves, (c) fittings and blow-offs, (d) a spray irrigation system, (e) a raw sewage pump station, (f) a two-cell aerated lagoon, (g) a winter storage lagoon, and (h) a pumping station.

Rockwell witness Mr. Michael Albach set forth Rockwell's proposed accounting entries for the acquisition. Rockwell Ex. 4.0R; Rockwell Ex. 6. In accordance with Accounting Instruction 21 of the Uniform System of Accounts for Class A Water Utilities,

the original cost of the System, net of depreciation, would be debited to Account 104. Rockwell Ex. 4.0R, Ins. 23-26. The difference between the original cost of the System, net of depreciation, and the purchase price would be recorded in Account 114 - Acquisition Adjustments. *Id.*, Ins. 28-29. Rockwell would amortize the acquisition adjustment to Account 421 - Non-Operation Income, over a 20 year period. *Id.*, Ins. 29-30. In addition, Rockwell proposed to record its fees to complete the transaction, which Rockwell estimated to be \$375,000, to Account 301 - Organization. *Id.*, Ins. 31-43; Rockwell Ex. 1.0R, In. 191-211. Rockwell also proposed journal entries to record any future increase or decrease in the purchase price due to the IEPA permitting additional capacity for the system or to reflect payments from Jupiter Development for the development of additional apartment units, respectively. Rockwell Ex. 4.0R, Ins. 44-58.

Mr. Jeremy Lin, the Managing Principal of Lintech Engineering, LLC, a civil engineering consulting firm, provided his opinion that the original cost of the System is best estimated based on available records to be \$4,916,619. Rockwell Ex. 2.0, Ins. 44-64, JCL 2.1-2.3. He also stated that Rockwell has added \$100,449 in improvements to the wastewater facilities. *Id.*, Ins. 67-71. Rockwell notes that Staff did not disagree with Rockwell's proposed original cost for the System.

In addition, Mr. Lin proposed depreciation rates equal to 50 years for all plant items, as an average, with the exception of water meters that he recommended be given a 10 year life expectancy. *Id.*, Ins. 72-81. Finally, Mr. Lin identified the average projected increase in the number of customers to be served by Rockwell through 2010 as new homes are constructed in the area, and attested to his opinion that the water plant has capacity to serve the area at its full projected build-out, and that the sewer plant, with reasonable enhancements, does as well. *Id.*, Ins. 82-119.

IV. Issues

Staff and the District identified several issues with the Company's filing which are addressed below.

A. Least-Cost Option

Staff witness Thomas Q. Smith testified that in his opinion, based on information currently available to him, including the observation that no other utility was currently capable of providing water and sewer service to Rockwell's customers, Rockwell's proposal represents the least-cost option for satisfying the service needs of the customers in the subject area. ICC Staff Exhibit 2.0 at 7.

The District, on the other hand, contends that Rockwell failed to show that it can provide water and sewer service at least cost and that Staff failed to consider the issue of sustainability regarding whether Rockwell is the least-cost service provider.

In its Reply Brief, Staff responds that the District's mere assertion that the lack of ability to finance renders the operations of the system as something other than least-cost is, in and of itself, an unsustainable argument.

Staff witness Freetly testified that, pursuant to Section 8-406(b)(3) of the Act, Rockwell is capable of financing the operation and maintenance of the facilities for which certification is requested due to the obligation of the Kirk Corporation ("Kirk") to provide Rockwell with debt and equity capital in accordance with the Operating Agreement. Thus, Ms. Freetly determined that Rockwell would have adequate access to capital because of its relationship with Kirk. ICC Staff Exhibit 3.0; ICC Staff Exhibit 8.0. Staff notes that what the record is truly devoid of is evidence that the District is operationally able at this time to serve these water and sewer customers.

In its Reply Brief, Rockwell states that the record is replete with information which supports Rockwell's position that it can provide the facilities on a least cost means. In support of its position, Rockwell provided an in-depth examination of the purchase price, of how costs to customers will be minimized by favorable developer contribution requirements, and how Rockwell's facility capacity can be increased with little or no additional costs to ratepayers. According to Rockwell, there is simply no evidence that contradicts Rockwell's direct case and The District itself failed to make any assessment of whether the construction of its new facilities would be a least cost means of satisfying the service needs to Rockwell's customers.

Rockwell maintains that the District's allegation that Staff failed to address the issue of Rockwell's financial sustainability is erroneous for two reasons. First, Rockwell's request for permanent rates was removed from consideration in this proceeding. It is absurd to now argue that Rockwell is incapable of long-term financial sustainability when the ability to obtain long term rates was removed from the proceeding. Once a Certificate is granted there is nothing to prevent Rockwell from seeking its first permanent rate. Secondly, Staff has considered Rockwell's financial sustainability. Staff reviewed Rockwell's requests for initial financing and refinancing approvals and recommends their approval. Staff Ex. 3.0, Ins. 23-27, Staff Ex. 8.0, Ins. 38-39. Additionally, on a going forward basis Staff has requested, and Rockwell agrees to provide, periodic reports of Rockwell's actual financial information. Staff Ex. 5.0, Ins. 84-98.. The information Staff will review on a prospective basis includes Rockwell's plant investment, revenues and expenses. *Id.* One purpose for obtaining such information is to determine whether rates should be reassessed to ensure that Rockwell's temporary rates are not too low so as to negatively impact its ability to serve.

Rather than address Rockwell's supporting financial information, The District instead asserts that its Verified Application for Rehearing supports its position that it can provide service on a least-cost means. However, Rockwell argues that the District's Verified Application for Rehearing is not part of the evidentiary record in this docket. Further, the District owns no water facilities and fails to describe how it would provide such service. There is absolutely no evidence as to how the District would construct a water service plant or how it would do so on a least-cost means. Also, the District has

no sewer facilities within the proposed service territory. District Verified App. for Reh'g., ¶28. The District provides absolutely no evidence as to how it could construct sewer service to and throughout the proposed service territory or how it would do so on a least-cost means. The District does not reconcile its belief that it can construct facilities on a least cost means with its statement that it will cost \$19 million dollars to serve land near Rockwell's proposed service territory. The District Init. Br., p. 2. Presumably, the additional cost to construct the nearby facilities, together with the District's impact or tap-on fees, would be passed on to customers should it serve Rockwell's customers.

B. Capability to Efficiently Manage and Supervise

Staff witness Smith testified that in his opinion, based on his inspection of the Rockwell water and sewer systems, and his review of the Company's direct testimony and data request responses, Rockwell is capable of efficiently managing and supervising construction of the water and sewer systems. ICC Staff Exhibit 2.0 at 7.

C. Identification of the Proposed Service Area

Staff witness Smith requested that Rockwell provide a correct metes and bounds legal description of the subject area. ICC Staff Exhibit 2.0 at 7-9. In rebuttal testimony, Mr. John P. Carroll provided an accurate metes and bounds legal description. Rockwell Exhibit 5.0 at 2; Exhibit JPC 5.1. Staff witness Smith, in rebuttal testimony, agreed that the metes and bounds legal description provided by Mr. Carroll was adequate to support the record. ICC Staff Exhibit 7.0 at 2.

D. Rules, Regulations, and Conditions of Service

Staff witness Smith recommended that if granted a Permanent Certificate, Rockwell should adopt rules, regulations, and conditions of service to govern its water and sewer operations in the form of Attachments 1 and 2 to his direct testimony. He noted that his proposed rules were consistent with not only 83 Ill. Adm. Code 600.370 but also with rules that have been approved by the Commission in several recent proceedings. ICC Staff Exhibit 2.0, at 9-11.

In rebuttal testimony, Company witness Carroll proposed an exemption from the main extension rules to acknowledge Rockwell's pre-existing agreements with existing developers. While Staff witness Smith agreed, in his Rebuttal Testimony, with the Company's proposal regarding the exemption from the main extension rules, he recommended that the exemption be limited to agreement in place on May 1, 2007. Rockwell has agreed to utilize the Rules and Regulations and Conditions of Service for water and sewer operations provided in Mr. Smith's rebuttal testimony.

E. Tap-on-Fee Misnomer

Staff witness Smith noted that the Jupiter Agreement (Attachment E to the Revised Amended Petition) provides for arrangements by which Lakemoor Building

Corporation will provide water and sewer service to the Jupiter Apartments, and uses the term "tap-on-fee". Rockwell is assuming the obligation under Jupiter Agreement to provide water and sewer service. While 83 Ill. Adm. Code 600.370(a) does not permit the use of tap-on-fees, Mr. Smith explained that in this instance tap-on-fee is a misnomer and that the type of fee contemplated by the Jupiter Agreement is not contrary to the Commission's rules. ICC Staff Exhibit 2.0 at 13-15.

F. Unaccounted-for-water Tariff

Staff witness Smith explained that Section 8-306(m) of the Act, 220 ILCS 5/8-306(m), requires that Rockwell must have a tariff on file with the Commission which limits the amount of unaccounted-for water for the purpose of setting rates or surcharges to be charged to customers. He recommended that the Company file such tariff limiting unaccounted-for water to 15%. ICC Staff Exhibit 2.0 at 15-16; Attachment 3. In rebuttal testimony, Rockwell witness Carroll accepted Mr. Smith's maximum unaccounted-for water proposal and indicated the Company will file such tariff upon issuance of a Final Commission Order granting a Permanent Certificate in this proceeding. Rockwell Exhibit 5.0 at 6.

In rebuttal testimony, Staff witness Smith refined the unaccounted-for water tariff to reflect the proper form and include the proper tariff sheet number. ICC Staff Exhibit 7.0 at 5; Attachment 7.3. Rockwell agreed, in surrebuttal testimony, to file the subject tariff as set forth in Mr. Smith's Attachment 7.3. Rockwell Exhibit 9.0 at 3.

G. Depreciation rates

Regarding depreciation rates, Rockwell witness Lin proposed depreciation rates equal to 50 years for all plant items, as an average, with the exception of water meters that he recommended be given a 10 year life expectancy.

Staff witness Johnson testified that the 50 year service life would generate a 2% depreciation rate and a 10 year service life would generate a 10% depreciation rate. Mr. Johnson examined a sample of ten annual reports of small regulated water and/or sewer utilities in Illinois and found that nine use the composite method proposed by Mr. Lin. He found that a 50 year average service life for most plant accounts was common in the ten annual reports he examined.

The water meter service lives Mr. Johnson examined in the annual reports were mixed. He found that Mr. Lin's proposed 10 year service life for water meters does coincide with 83 Ill. Adm. Code 600.340 where a guideline for either inspection or replacement of water meters is discussed and depending on water meter size, the rules mandate that water meters be tested or replaced in a range from 4 to 10 years. Mr. Johnson stated that the area Rockwell is proposing to serve would be mostly residential units where water meters would fall into the 10 year guideline found in 83 Ill. Adm. Code 600.340.

Mr. Johnson testified that because Rockwell is a small water and sewer utility and its proposed service lives are consistent with those utilities he sampled, he did not object to Rockwell using a 50 year service life for all items of utility plant (water and sewer), except water meters which would have a 10 year service life. However, because service life, salvage and depreciation rates are all items that should be periodically examined, he indicated that these items may need to be reinvestigated in future rate proceedings.

H. Water and Sewer Rates

Staff witness Luth testified that, if the Commission grants Rockwell's request in its Revised Amended Petition for a Permanent Certificate to provide water and sewer service, as a regulated public utility, Rockwell's rates should be on file with the Commission within five days of the Final Commission Order. Mr. Luth's recommendation is a continuation or reiteration of a similar directive in the Interim Order Interim Order at 4, paragraph (4). The Interim Order in these consolidated dockets granted a Temporary Certificate to Rockwell allowing the Company to provide water and sewer service to the requested area as a public utility and charge rates that had been in place under the previous owner of the water and sewer systems. For water, the rate currently in effect is \$3.70 per 1,000 gallons of metered water, in addition to a charge of \$24.00 per quarter or three month billing period. For sewer, the rate currently in effect is \$66.50 per quarter. As indicated in the Interim Order, both the water and sewer rates are based upon rates currently in effect for the Village of Island Lake, Illinois. Interim Order at 4, paragraph (2). ICC Staff Exhibit 4.0 at 2-3.

Rockwell witness Carroll stated that the Company accepted Mr. Luth's recommendation, and agreed to file the necessary tariff sheet(s) within five days of the Commission's Order. Rockwell Exhibit 5.0 at 9.

I. Journal Entries

Staff witness Everson recommended that Rockwell modify its proposed journal entries to separately identify accumulated depreciation amounts related to each plant account. ICC Staff Exhibit 5.0 at 3. Rockwell agreed in the rebuttal testimony of Michael Albach to utilize the format proposed by Ms. Everson. Rockwell Exhibit 6.0 at 2. Staff witness Everson indicated in rebuttal testimony that the proposed journal entries presented in the rebuttal testimony of Michael Albach as Rockwell Exhibit MA 6.1 were the correct form for journal entries to record the purchase of the Rockwell system. ICC Staff Exhibit 9.0 at 3.

Ms. Everson also recommended that the Company file its actual journal entries with the Chief Clerk of the Commission with a copy to the Manager of the Accounting Department within 6 months of the Commission's Final Order in this proceeding. ICC Staff Exhibit 5.0 at 3. The Company agreed to Staff witness Everson's recommendation to file the actual journal entries as described in the surrebuttal testimony of John P. Carroll. Rockwell Exhibit 9.0 at 5.

J. Reports of Financial Information

Staff witness Everson recommended that Rockwell provide reports of actual financial information for the water and sewer system until such time as Rockwell is granted permanent rates established in a formal rate proceeding. The reports of actual financial information are necessary because Rockwell's Temporary Certificate allows the Company to charge rates that were in effect for the area when the Interim Order was issued until such time as the Commission orders that replacement rates be established. Ms. Everson noted that no review of the appropriateness of those rates has been conducted. Therefore, Ms. Everson recommended that the reports of actual financial information be provided to the Chief Clerk of the Commission with a copy to the Manager of Accounting every six months for each six month period ending June 30th and each 12 month period ending each December 31st until the Commission establishes permanent rates for Rockwell. ICC Staff Exhibit 5.0 at 4-5. Ms. Everson further recommended that the reports of financial information include, but not be limited to, the aggregated plant investment, revenues, direct expenses, allocated expenses, Contributions in Aid of Construction received, number of customers, the status of construction projects, a schedule of services provided by Kirk to Rockwell and the charges related to each of the listed services. Id. at 5.

Rockwell agreed to the recommendation to provide reports of actual financial information but indicated that it would file the recommended reports until Rockwell files for permanent rates. Rockwell Exhibit 5.0 at 11. Because Rockwell will provide financial information in a rate filing which would then be reviewed by Staff and thus achieve the purpose for which Ms. Everson made the recommendation, Ms. Everson indicated her acceptance of Rockwell's proposed modification to limit the duration of the reporting requirement. ICC Staff Exhibit 9.0 at 3.

Also in rebuttal testimony, Rockwell indicated that it would file the recommended reports of actual financial information within three months of the close of each respective period. Rockwell Exhibit 5.0 at 11. Ms. Everson agreed with Rockwell's proposal to submit the required reports of actual financial information within three months of the close of the respective period. ICC Staff Exhibit 9.0 at 4.

K. Affiliate Service Agreement between Rockwell and The Kirk Corporation

Staff witness Everson discussed four concerns regarding the Affiliate Service Agreement ("ASA") between Rockwell and The Kirk Corporation ("Kirk"), which included: 1) insufficient documentation regarding charges from Kirk; 2) insufficient language regarding the documentation of charges based on Kirk employees' time; 3) inconsistent language concerning the format of the bill that Rockwell will receive from Kirk; and 4) an inability for Commission Staff to obtain information related to services provided by Kirk to Rockwell. ICC Staff Exhibit 5.0 at 6.

Ms. Everson stated the Company only provided information that could be used for evaluating the reasonableness of charges without addressing how the charges were initially determined. Without language governing the basis of the charge to Rockwell, the charges cannot be evaluated for reasonableness. Ms. Everson recommended that Rockwell modify its ASA to contain the following language in Section 2.2:

If there is no prevailing market for the service, Kirk agrees to document to Rockwell that the rate is no greater than the rates charged for similar services to other companies in the surrounding area. The documentation provided by Kirk to Rockwell must show how Kirk determined the cost it is charging to Rockwell. This documentation must be maintained until the Illinois Commerce Commission sets Rockwell's rates in a rate proceeding. Id. at 8.

In the rebuttal testimony of John Carroll, Rockwell agreed to revise its ASA. Rockwell Exhibit 5.0 at 11-12.

Ms. Everson also discussed the inconsistency between Rockwell's and Kirk's intentions regarding the method of billing to Rockwell. ICC Staff Exhibit 5.0 at 8. In response to a data request, Rockwell indicated that Kirk planned to utilize electronic journal entries for billing Rockwell instead of an actual invoice as specified in Article III, Section 3.1 of the ASA. Ms. Everson recommended that Rockwell and Kirk abide by the language in Article III, Section 3.1 of the ASA. *Id.* at 9. Rockwell agreed that Kirk would provide an invoice to Rockwell in accordance with Article III, Section 3.1 of the ASA. Rockwell Exhibit 5.0 at 12.

Ms. Everson also discussed her concern regarding the inability of Staff to obtain information related to services provided by Kirk to Rockwell if Rockwell must obtain such information from Kirk. Ms. Everson stated that Section 3.3 of the ASA indicated that Kirk will furnish any and all information required by Rockwell. In accordance with this Section as it was then written, Rockwell must obtain information regarding transactions from Kirk to respond to Staff data requests. Because the terms of Section 3.3 appeared to indicate that Kirk would be the entity controlling the records of transactions between Rockwell and Kirk, the potential existed that Rockwell could refuse a Staff data request on the ground that it did not have the requested information. Thus, Ms. Everson recommended the following revision to Section 3.3 of the ASA:

Kirk will furnish any and all information required by Rockwell. In addition, Rockwell agrees to require such information on affiliate transactions from Kirk when the information is recorded in the books and records of Kirk and that information is requested by the Staff of the Illinois Commerce Commission. ICC Staff Exhibit 5.0 at 10-11.

Rockwell indicated in its rebuttal testimony that it agreed to make the recommended revision to its ASA. Rockwell Exhibit 5.0 at 12-13.

Because Rockwell did not provide a revised ASA until its surrebuttal testimony, Ms. Everson was unable to recommend that the Commission approve the revised ASA until the evidentiary hearing. Ms. Everson stated that she was able to review the revised ASA filed with Rockwell's surrebuttal testimony of John Carroll as Rockwell Exhibit JPC 9.1. Ms. Everson also stated that the revised ASA incorporated all of her recommended changes and therefore, she recommended the Commission approve Rockwell's revised affiliate agreement. Tr. at 166-167.

L. Rockwell's Operating Agreement

Staff witness Everson indicated that she reviewed the Operating Agreement of Rockwell Utilities, LLC ("Operating Agreement") (Attachment G to the Revised Amended Petition), which sets forth the obligations and responsibilities of Rockwell and Kirk regarding the formation and continuing operation of Rockwell. Ms. Everson found no reason to object to the Operating Agreement and recommended that the Commission approve it. ICC Staff Exhibit 5.0 at 12,15.

M. Water and Sewer Agreement between Rockwell and Rockwell Place, LLC

Staff witness Everson stated that the Water and Sewer Service Agreement between Rockwell and Rockwell Place, LLC sets forth the provisions that govern Rockwell's furnishing of water and sewer service to areas to be developed by Rockwell Place LLC. Ms. Everson stated that she found no reason to object to the Water and Sewer Service Agreement and recommended approval subject to any concerns expressed by Staff witness Thomas Smith. ICC Staff Exhibit 5.0 at 13.

Staff witness Smith noted that the Water and Sewer Service Agreement provided by Rockwell contained main extension rules that differed from the generic main extension rules he provided. He further indicated that given Rockwell's relationship with Rockwell Place, LLC, it would be appropriate to exempt Rockwell from the standard rules in favor of the rules contained in the Water and Sewer Service Agreement. ICC Staff Exhibit 2.0 at 12-13.

In rebuttal testimony, Company witness Carroll proposed an exemption from the main extension rules to acknowledge Rockwell's pre-existing agreements with existing developers. While Staff witness Smith agreed, in his Rebuttal Testimony, with the Company's proposal regarding the exemption from the main extension rules, he recommended that the exemption be limited to agreement in place on May 1, 2007. Rockwell has agreed to utilize the Rules and Regulations and Conditions of Service for water and sewer operations provided in Mr. Smith's rebuttal testimony.

N. Rockwell's Financial Capability and Ability to Incur Indebtedness

Staff witness Freetly testified regarding Rockwell's financial capability to operate and maintain the water supply and sanitary sewer facilities for which certification is

requested pursuant to Section 8-406(a) of the Act, and to construct new facilities pursuant to Section 8-406(b)(3) of the Act. Ms. Freetly also addressed Rockwell's request for authorization to incur indebtedness pursuant to Section 6-102 of the Act.

Rockwell is an affiliate of Kirk. Rockwell is a limited liability company, with Kirk as its sole member. Rockwell's Operating Agreement (Attachment G to the Revised Amended Petition) sets forth the obligations and responsibilities of Rockwell and Kirk to each other relative to the formation and continued operation of Rockwell as a limited liability company. It also sets forth the terms under which Kirk will provide Rockwell with the capital necessary to acquire, operate and maintain the water supply and sanitary sewer facilities to serve the area for which certification is requested. Pursuant to the Operating Agreement, Kirk will provide capitalization to Rockwell comprised of 40% equity and 60% debt. Kirk has agreed to provide debt capital to Rockwell bearing interest at 8.75%, which is 0.5% above the national prime rate of 8.25%. Attachment G to the Revised Amended Petition, Section III.

Kirk is a real estate development company with 2005 revenue in excess of \$134,000,000, assets of nearly \$100,000,000 and equity of approximately \$40,000,000. Kirk has access to a \$75,000,000 line of credit. Rockwell Exhibit 1.0R at 13; Exhibit JPC 1.16. As of September 30, 2006, approximately \$39,000,000 of that line of credit was available to Kirk and \$2,651,250 of the credit line was authorized in advance for availability to Rockwell for acquisition of the utility. ICC Staff Exhibit 3.0 at 4.

Rockwell financed the acquisition of the water and sanitary sewer systems with a combination of equity funds and borrowed funds provided by Kirk. All additions to the water and sewer systems will be funded by the developers without refund from Rockwell. Any expenses that will be borne by Rockwell will be financed through a credit line provided by Kirk. Id. at 3.

In Staff's judgment, due to the obligation of Kirk to provide Rockwell with equity and debt capital in accordance with the Operating Agreement, Rockwell is capable of financing the operation and maintenance of the water supply and sanitary sewer facilities for which certification is sought in this proceeding. In addition, because the developers will fund all of the additions to the water and sewer systems without refund from Rockwell, the construction of new facilities will not have adverse financial consequences for the utility or its customers. Id. at 5-6.

Pursuant to Section 6-102 of the Act, Rockwell requests authorization to issue and sell bonds in an amount not to exceed \$3,200,000. Rockwell Exhibit 5.0 at 7-8. Rockwell expects that the bonds will be issued and sold after a Commission Order is entered in this proceeding and not later than August 1, 2008. Rockwell states that the bonds will bear an expected interest rate not to exceed 7.00%. Id. at 8. Rockwell will use the entirety of the proceeds from the sale and issuance of the bonds to refinance its current debt to Kirk and pay related expenses. Staff states that because Rockwell will use all of the proceeds from the intended sale and issuance of bonds to refinance its current debt to Kirk, the proposed financing is not subject to Section 6-102(b) of the Act.

According to Staff, Rockwell's proposal is subject to Section 6-102(d) of the Act, which requires the Company to set forth the type and amount of the issue and the purpose or purposes to which the issue or the proceeds thereof are to be applied. Section 6-102(d) of the Act also requires a Commission Order in conformance with Section 6-102(a) of the Act authorizing the issuance. Section 6-102(a) of the Act requires a Commission Order authorizing the issuance and stating the amount thereof and the purpose(s) to which the proceeds are to be applied and that such application(s) is reasonably required.

In Staff's opinion, the financing is reasonably required because it will lower Rockwell's debt service costs. Rockwell expects to realize substantial savings by issuing lower cost bonds and states that refinancing its current debt will allow Rockwell to take advantage of the current favorable interest rate environment. Id. The debt capital provided by Kirk bears interest at 8.75%. Rockwell expects the new debt to bear interest at no more than 7.00%. Id.

Rockwell's proposed financing is subject to Section 6-101 of the Act, which requires the Commission to provide proper identification numbers on the bonds when issued. Rockwell's proposal is also subject to Section 6-108 of the Act, which requires the Company to pay a fee equal to 24 cents for every \$100 of principal amount of bonds authorized by the Commission. Staff calculates that the Section 6-108 fees on \$3,200,000 are \$7,680. ICC Staff Exhibit 8.0 at 3.

In addition, Rockwell's proposed financing is subject to 83 Ill. Adm. Code 240 ("Part 240"), which requires the Company to file quarterly reports concerning the issuance of the bonds and the application of the proceeds of the bonds authorized by the Commission's Order. Id. at 3-4.

V. Commission Conclusions

In this proceeding, Rockwell seeks, among other things, a Certificate of Public Convenience and Necessity, pursuant to Section 8-406 of the Act, authorizing it and to provide water and sewer service as a public utility in the subject area, consisting of the Sullivan Lakes Parcel, the Meadows Apartments and other real estate within the Village of Lakemoor in Lake County, Illinois.

Rockwell is the only entity that currently has facilities capable of providing water and sewer services in the subject area. Despite the District's protests that Rockwell is not the least cost provider, it provided no evidence that it, or any other entity, could provide service to the subject area at less cost to consumers.

As noted above, Rockwell proposes to serve the new area under the rates currently in effect for the Village of Island Lake, Illinois, consistent with our Interim Order in this proceeding. Also, Rockwell is directed to file a tariff sheet with the Chief Clerk's Office that specifies the rates customers would pay and the bases for those rates. The Commission finds this proposal to be reasonable.

The Commission finds that the proposed depreciation rates shall be approved and that Mr. Johnson's recommendations shall be adopted.

The evidence in this docket supports the conclusion that Rockwell's request will promote the public convenience and is necessary thereto in accordance with Section 8-406 of the Act. In its direct and rebuttal testimony, Staff made several determinations and recommends that the Certificate, as well as the additional relief requested by Rockwell, be granted. Staff found that Rockwell has the requisite technical and managerial capabilities to provide service to customers in the area. Staff Ex. 2.0, Ins. 144-55. Further, Staff concludes Rockwell is capable of financing the operation and maintenance of the water supply and sanitary sewer system, and has been able to acquire the system and construct new facilities without significant adverse financial consequences for the utility or its customers. Staff Ex. 3.0, Ins. 23-27.

Having reviewed the record, we find that Rockwell has satisfied the requirements of Section 8-406 of the Act for the issuance of a Certificate of Public Convenience and Necessity, subject to the conditions found appropriate herein as stated in the Findings and Ordering paragraphs stated in this Order.

The Affiliate Service Agreement, the Operating Agreement of Rockwell Utilities, LLC and the Water and Sewer Service Agreement between Rockwell and Rockwell Place, LLC are agreements with an affiliated interest within the meaning of Section 7-101 of the Act. Pursuant to the Act, an agreement with an affiliated interest cannot be effective without Commission approval. The Commission finds that the Affiliate Service Agreement, the Operating Agreement of Rockwell Utilities, LLC and the Water and Sewer Service Agreement between Rockwell and Rockwell Place, LLC, as modified by the agreement of Rockwell and Staff, are reasonable and in the public interest and should be approved.

VI. The District's Clean Water Act Argument

A. The District's Position

The District, maintains that the Commission does not have the authority to grant Rockwell's requested relief. According to the District, the Commission's authority is preempted by federal law because the Subject Area falls within the boundaries of a Facility Planning Area ("FPA") established under the Clean Water Act, 33 U.S.C. §§1251-1387 ("CWA"). The District maintains that it has the exclusive right to provide wastewater treatment service to the subject area in the Village of Lakemoor because it is within the District's Facility Planning Area established under the CWA and the District is the Designated Management Agency ("DMA") authorized to provide wastewater planning, collection, and treatment services there. The District argues that the Commission's grant of a Certificate to Rockwell to serve the same area conflicts with the CWA, is preempted by this supreme federal law under principles of conflict preemption and is void. The District avers that the Commission should dismiss

Rockwell's request for a Certificate until Rockwell complies with the CWA and the implementing federal and state regulations.

According to the District, the CWA establishes a regulatory scheme for wastewater treatment. It provides that, in any given state or region, authority to administer the regulatory scheme can be delegated by the United States Environmental Protection Agency ("U.S. EPA") to a state or regional regulatory agency, provided that the applicable state or regional regulatory scheme under which the local agency operates satisfies certain criteria. 33 U.S.C. §1342(b). In the State of Illinois, the District states that the Illinois EPA has the authority to administer this regulatory wastewater treatment scheme established by the CWA. 415 ILCS 5/39. Under the established regulatory scheme, the District asserts, if an entity desires to provide wastewater treatment in an area within an FPA, it must become the DMA for the FPA. The CWA, and Illinois law implementing the CWA regulatory framework for wastewater treatment, provide specific, formal procedures that must be followed for filing and review of such a request. See, e.g., 40 C.F.R. §130.9(d); 35 Ill. Adm. Code Part 351; the Illinois Water Quality Management Plan Amendment Package (Bureau of Water 1992); 35 Ill. Adm. Code Part 399. Without complying with these specific and formal procedures and becoming the DMA, an entity cannot provide wastewater treatment within the FPA. The District argues that to the extent the Illinois EPA has issued permits to Rockwell or to the plant that will serve the Subject Area, the Illinois EPA has not followed this federally mandated process.

Further, the District contends that because it is the designated DMA for the FPA that includes the Subject Area pursuant to the CWA, the Commission's issuance of a Temporary Certificate to Rockwell and the proposed issuance of a permanent Certificate to Rockwell conflicts with the District's authority as the DMA for the Subject Area "to plan, design, construct, own and operate sewer facilities, including wastewater treatment facilities." *Town of Sugar Loaf*, 305 Ill.App.3d 483, 484-485, 712 N.E.2d 39, 394-395 (5th Dist. 1999). According to the District, the Illinois EPA permits issued to Rockwell to serve the Subject Area do not comply with the CWA because Rockwell has never followed the specific formal procedures required pursuant to the CWA to become the District's DMA.

Moreover, the District alleges that principles of conflict preemption prevent the Commission from granting Rockwell a Certificate to provide wastewater treatment in the subject area. According to the District, there is a direct conflict between granting a Certificate to Rockwell allowing it to serve the subject area while at the same time the CWA provides that the District is the DMA for an FPA that includes the subject area. The District contends that the fact that the Illinois EPA has or will issue permits to Rockwell to operate a wastewater treatment plant for the subject area, flies in the face of the statutory system established by the CWA governing the permitting of wastewater treatment plants.

B. Staff Reply

According to Staff, the most important factor to consider in any preemption analysis is the intent of Congress. *California Federal Savings & Loan Ass'n v. Guerra*, 479 U.S. 272, 280 (1987). In fact, there is a "presumption" against the finding of a preemptive conflict between state and federal law. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). Particularly where Congress is regulating "in a field which the States have traditionally occupied," courts "start with the assumption" that the State's authority was "not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (internal quotation omitted). In this case, Staff asserts, Congress has continued to demonstrate respect for state water law regimes and to encourage "cooperative federalism."

In the instant proceeding, Staff maintains, there is no preemption infringement, because Rockwell received the proper IEPA permits and adhered to the proper water quality standards. In this case, the CWA's regulatory scheme was honored. Thus, the purpose of the federal legislation and objectives of Congress were accomplished and no preemption applies. In view of that, 1) the District has the ability to carry out its duties and obligations pursuant to the Sanitary District Act of 1917 (70 ILCS 2405/1 et seq.); 2) the IEPA can fulfill its responsibilities, which include administering the regulatory wastewater scheme established by the CWA as described below; and 3) Rockwell may provide wastewater treatment to the subject area.

Staff argues that the District cannot have its cake and eat it too. On the one hand, the District defines the broad authority of the IEPA. But on the other hand, while the IEPA issued permits to Rockwell's predecessor, Lakemoor Building Corporation (wastewater treatment operation for the Jupiter apartments), from 1987 to January 2007 and the IEPA recently approved Rockwell's permit to operate the facilities (Rockwell IB, pp. 2-3), the District now argues this violated the CWA. The District's argument fails as circular reasoning. In other words, if the IEPA has the authority to carry out the wastewater scheme of the CWA and it has awarded permitting to Lakemoor for the past twenty years and now to Rockwell, then there is no preemption violation. The Northern Illinois Planning Commission and the Designated Management Agency (such as the District), may have an advisory role to play and may make recommendations to the IEPA, but the ultimate decision making authority on permitting issues and the State's WQMP lies with the IEPA.

Staff avers that the preemption argument cannot be successfully raised before the Commission. Either the Commission should determine that the District has not demonstrated a legitimate preemption case for the reasons described above and therefore preemption does not apply here, or the Commission could choose not to address the preemption issue. Moreover, if the District considers the Commission's enforcement of a valid State law (Section 8-406 of the Act) to be preempted by federal statute (i.e., the CWA), it certainly has remedies, but not before the Commission. Staff states that it is utterly unaware of why the District has not addressed this matter with the

IEPA or taken their case to a federal or state court and instead has waited nearly two decades to raise a federal CWA preemption argument in front of the Commission.

The District accuses Staff of refusing to consider any federal or state Laws other than the Public Utilities Act. Staff asserts that the District's support for this allegation arises from its misinterpretation of a statement made by Staff witness Smith under cross-examination. (District IB, pp. 16-17). Because Mr. Smith is not an attorney, he would not have occasion to consider the relevancy of other laws, if in fact, other laws might even be relevant. Mr. Smith's task was to investigate Rockwell's request for a Permanent Certificate pursuant to the criteria set forth in Section 8-406 of the Act. Because Mr. Smith was required to use Section 8-406 of the Act, it would have been absurd for him to troll Federal and State statutes looking for additional laws.

C. Rockwell Reply

Rockwell asserts that the District's preemption argument is incurably flawed. The District neglects to consider that Rockwell's system is not a "point source" system, the kind of system that requires CWA Facilities Planning Area ("FPA") notification and Designated Management Agency ("DMA") consultation. Rockwell's system, a spray irrigation system, simply does not impact water quality and as such is not subject to the planning processes the District contend are required by the CWA. Because of its failure to properly distinguish the type of system operated by Rockwell, The District's preemption theory should be rejected. Furthermore, for the past 20 years the system acquired by Rockwell has been properly sited, zoned and permitted. Lastly, the Commission does have the authority to grant Rockwell a Certificate.

The Basis Of The District's Preemption Argument Is Flawed

The District states that the Commission's authority is preempted by federal law, and granting a Certificate to Rockwell would violate the CWA. District Init. Br., pp. 6-14. Rockwell argues the Commission is not preempted by any federal law. Granting a Certificate will not violate the CWA because Rockwell's facility fully complies with the CWA.

Rockwell points out that the CWA delegates certain responsibilities to the states. The Illinois Environmental Protection Act further delegates the implementation of the CWA to the IEPA. 415 ILCS 5/1 *et seq.* With respect to siting, and relevant to this proceeding, are two distinct IEPA responsibilities: the requirement to look at the technical specifications of any facility that could impact the state's water; and the requirement to ensure that area-wide planning for water quality maintenance is achieved. *Calvary Temple Church v. IEPA*, PCB 90-3, 1990 WL 117041 (Ill. Pol. Control Bd. April 26, 1990). The IEPA satisfied both responsibilities in 1987 when it issued Lakemoor the initial permit and has continued to review and verify its actions since that time.

The Spray Irrigation System Does Not Impact The State's Water Quality

The Rockwell system is not the typical sewage treatment system, where treated water is discharged into a surface water body. Rather, the Rockwell system is a land treatment system, which does not impact ground or surface-water quality. The Rockwell system uses treated water for irrigation. The treated water is dispersed through subsurface piping and stationary sprinkler heads. The water percolates through the soil at the very near subsurface (no deeper than 3") and does not enter either the groundwater or any surface water. Plant life uses or biodegrades the remaining nitrogen and other trace pollutants, and other physical and biological processes further degrade or use the irrigated water, all in the near surface of the soil. There is no impact to water quality from this process. A more thorough explanation of the Rockwell system is contained within the IEPA permit file for permit 1991-GB-3512, November 27, 1991. Rockwell Reply Ex. 1, pp. 64-95. For these reasons, Rockwell's system does not impact "water quality management," as that term is used in the CWA.

The Rockwell system as described above is referred to as a spray irrigation system, not a point source, as there is no discharge to navigable waters or, indeed, to any water at all. See 33 U.S.C. § 1342. Because there is no discharge to surface water, a National Pollutant Discharge Elimination System ("NPDES") Permit is not required; and, thus, the FPA planning processes found in Section 208(d) of the CWA are not implicated in this situation. See *specifically* the April 13, 1982, Letter from Illinois EPA to Marchris Engineering Limited, (stating that "the decided advantages" to a spray irrigation system are that "No requirement to amend the applicable Area-wide Water Quality Management (208) Plan" exists and "No requirement for a[n NPDES] permit" exists. Rockwell Reply Ex. 1, p. 98. In fact, the initial permit issued to Lakemoor and succeeding operating permits for the system state that, should the process change and a discharge to surface waters become necessary, a NPDES permit would be required. See Rockwell Reply Ex. 1, pp. 28, 121, 182, 195, 296 (Special Conditions). The IEPA must not issue a permit that would violate the law. 415 ILCS § 5/39. Consequently, if water quality is impacted in any way, the Special Conditions of the permits require Rockwell to seek a NPDES permit. The IEPA has never found that the operation of Rockwell's spray irrigation system requires an NPDES permit.

The IEPA Properly Exercised Its Water Quality Management Plan ("WQMP") Authority

Rockwell notes that the IEPA also must ensure that area-wide planning for water quality maintenance is achieved. Water quality management is delegated to IEPA by the Illinois Environmental Protection Act, 415 ILCS 5/4(m). The IEPA has the authority to maintain the WQMP. *Id.* The WQMP automatically updates each and every time the IEPA makes a permit decision that impacts state water quality, and in so doing, aids IEPA with making sound economic and environmental decisions. The IEPA, when appropriate, considers the recommendations of the DMA and other planning agencies in its decision-making process.

However, nothing in the WQMP guarantees the District a monopoly on customers. The WQMP requires the DMA and the IEPA to study alternatives in any geographic area, and determine the relative impact of each alternative on water quality. Lakemoor, the previous owner of the facility, was granted a permit to treat the wastewater from a designated geographical area under a planned unit development designation. No other sewer service was available at the time the system was permitted, zoned and approved by local and state authorities. Consequently, the geographical area that Rockwell now serves was planned as a geographically and financially self-supporting unit with no water quality impact and no impact to other publicly-owned infrastructure. Thus, while the facility may be within the boundaries of a sub-FPA or an FPA, or a DMA, none of those planning bodies or documents is affected by the continued existence and operation of the Rockwell system. Since it was originally permitted in 1987, the spray irrigation system has been part of the WQMP, as evidenced by IEPA's continued permitting of the plant. Additionally, Rockwell's sewage treatment plant does not impact the water quality of the area as described above, which is further demonstrated by the fact that IEPA requires no NPDES permit.

The District's contention that Rockwell's System required approval of the DMA and, thereby specific inclusion in the District's Facility Planning Amendment, is without merit. The District's argument incorrectly reaches far beyond the specific requirements of the CWA. The FPA/DMA notice and consultation process was created by the CWA to require states to plan for waste management by geographical area. 33 U.S.C. § 1251 *et seq.* The plans must contain "alternatives for waste treatment management." Section 208, 33 U.S.C. § 1288(b). Most importantly, the law dictates that no permit will be issued for "any *point source* which is in conflict with a plan" approved under the FPA/DMA process. 33 U.S.C. § 1288(e) (emphasis added). However, the Rockwell system is **not** a point source, and therefore the premise of The District's theory that the CWA requires notice or consultation with a DMA is in error. The CWA's Section 208 notice and consultation requirements are not applicable to Rockwell's system and, as such, the foundation of The District's preemption argument fails.

Rockwell's System Was Properly Sited, Zoned And Permitted Approximately 20 Years Ago

The District's Initial Brief attempts to depict Rockwell's facility as new, focusing only on certification filings and actions taken in 2006 and after. District Init. Br., p. 4. In doing so, Rockwell asserts that the District disregards and seeks to reverse approximately 20 years of proper siting, zoning and permitting decisions.

Siting And Zoning

Illinois law requires siting approval of a spray irrigation system, like the one acquired by Rockwell, to comport with the Wastewater Land Treatment Site Regulation Act (the "1973 Act"), S.H.A. Ch. 111 ½ § 581 *et seq.* (current version of this Act is at 415 ILCS 5/50 *et seq.*). At the time of Lakemoor's siting approval, the 1973 Act

required that: (a) the applicant obtain a "certificate of authorization" from the County Board, Section 4; and (b) the applicant obtain a permit from the IEPA, Section 3.05. *Id.* Rockwell points out that the 1973 Act's list of approvals required for approval of siting of a spray irrigation system makes no mention of a DMA or FPA. *Id.* It may be that these approvals were not required because the legislature did not consider a system that does not impact water quality to be subject to the CWA. The IEPA, in the Initial Permit and those issued subsequently, cautions the operator not to engage in activities that would impact water quality. (In 1988, a year after the Initial Permit was issued, the Illinois legislature modified the 1973 Act and specifically required the DMA/FPA consultation when a party sought siting approval for a spray irrigation system.) However, the consultation process for siting, and who and how IEPA consulted with parties regarding siting approval, still does not change the fact that IEPA fulfilled its CWA responsibility, looking at both the system's impact on area-wide water quality planning and the site specific impacts when it determined that no point source was present and an NPDES permit was not required.

On July 14, 1983, in an action taken in accordance with the Illinois Municipal Code, the Village annexed, zoned and approved a Planned Unit Development ("PUD") through an Annexation Agreement. The PUD envelopes the property Rockwell seeks to serve. Lakemoor was recognized and authorized in the Annexation Agreement to construct a sewage treatment plant and sewer lines and a complete water system to service the PUD. Consideration by the Commission of the Village's formal approval of the Annexation Agreement is appropriate as Administrative Notice can be taken of a rule, regulation, order or written policy of a governmental body or it may be taken of municipal or local ordinances pursuant to Part 200.640 of the Commission's Rules of Practice. 83 Ill.Adm.Code §200.640(a)(1) and (a)(4). Rockwell requests that the Commission take Administrative Notice of the Village's Annexation Agreement, filed as Rockwell Reply Ex. 2.

Paragraph 14.A of the Annexation Agreement states in relevant part:

OWNER shall cause a sewage treatment plant and sewer lines and a complete water system to service the entire project to be constructed . . . The OWNER intends to form a separate utility corporation to provide sewer and water facilities to be known as Lakemoor Utility Services, Inc. The Village is required to execute and approve such documents as are necessary and fully cooperate with OWNER in the formation of said utility company.

The District makes no claim that Lakemoor did not comply with the local authorizations requirement of the 1973 Act. Rockwell asserts that the District's protest, albeit approximately 20 years too late, is with the permits issued by IEPA. Rockwell argues that, despite the District's tardy objection, the fact is Lakemoor did comply with the Wastewater Land Treatment Site Regulation Act, as it obtained permits from the IEPA.

Permitting

In 1987, the IEPA properly issued Lakemoor permits for the site. During its permit review process in 1986 and 1987, the IEPA reviewed the site and technical specifications of the proposed system, including capacity, filtration and nutrient loading. On June 11, 2007 Rockwell submitted a Freedom of Information Act request to the IEPA requesting copies of the IEPA's permitting files as they relate to the system acquired by Rockwell. Copies of IEPA's permitting files are attached to Rockwell's Reply Brief.

Rockwell requests that the Commission take Administrative Notice of the IEPA's permitting files pursuant to Part 200.640 of the Commission's Rules of Practice. 83 Ill. Adm. Code § 200.640(a)(1). The permitting files contain documentation evidencing the formal action taken by the IEPA as well as the documentation supporting those decisions.

Rockwell points out that within the IEPA permit file for the 1987 permit, there is evidence of IEPA's consultation with other appropriate state authorities. For example, the 1987 permit file includes correspondence from the State Water Survey and discusses meetings with the Agricultural Extension Service. Rockwell Reply Ex. 1, pp. 2-3. The IEPA determined that water quality would not be impacted by Lakemoor's proposed treatment and irrigation system, and thus subsequently issued the permit. IEPA No. 1987-GA-1748, June 15, 1987 (corrected June 16, 1987), Rockwell Reply Ex. 1, pp. 028-031. Continuously over the following 20 years, the IEPA reviewed permit renewal applications and issued permits for the system. See IEPA No. 1991-GB-3512, November 27, 1991, Rockwell Reply Ex. 1, pp. 039-040; IEPA No. 1992-GO-1073, September 9, 1992, Rockwell Reply Ex. 1, pp. 121-25; IEPA No. 2006-GO-1421, July 31, 2006, Rockwell Reply Ex. 1, pp. 180-85; IEPA No. 2001-GO-4279, August 24, 2001, Rockwell Reply Ex. 1, pp. 194-96; IEPA No. 2007-GO-3071, February 7, 2007, Rockwell Reply Ex. 1, pp. 294-99. The descriptions and conditions in those permits have remained constant for twenty years, indicating that the IEPA found no conflict with FPA requirements, and found no reason based on the CWA to deny issuance of new permits. See also, *Sewer Construction Review Sheets*, from Illinois EPA Permit Files that contain the following checklist item and state in each and every case: Facilities Planning Area (FPA). Rockwell Reply Ex. 1, pp. 041, 145, 186, 210, 243, 268, 300.

Thus, Rockwell asserts, the IEPA satisfied its statutory obligations when it granted Lakemoor the initial permit. It conducted a site-specific review of the technical specifications and operating requirements for the proposed operations as well as an on-site inspection of the location. And the IEPA conducted a thorough review of area-wide water quality impacts, satisfying the IEPA's WQMP role under the CWA. Further, the IEPA has continued to re-issue permits for the past 20 years, including as recently as February 7, 2007. Rockwell Init. Br., p. 2.

Rockwell argues that the District's CWA claim is an ill founded attempt to reverse decades of proper siting, zoning, permitting and water quality management decisions

made by local and state regulatory authorities by a collateral attack made to the wrong agency.

The District's Attack On The Commission's Authority Is Without Merit

Rockwell notes that the District disputes the Commission's authority to grant a Certificate based upon its preemption theory. District Init. Br., p.5. In doing so, however, the District misrepresents the effect of the CWA's FPA processes on Commission's certification authority. 220 ILCS 5/8-406. Indeed, as discussed above, the Commission is not preempted from carrying out the Public Utilities Act. The Commission has the authority to grant Rockwell a Certificate once it is satisfied that Rockwell's proposal will promote the public convenience; and is necessary thereto. The District's attack on the Commission's authority is without merit and should be rejected.

D. Commission Conclusion

The District argues that the CWA preempts the Commission's ability to act in this situation. We reject this argument. Where Congress is regulating "in a field which the States have traditionally occupied," courts "start with the assumption" that the State's authority was "not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (internal quotation omitted). Our obligation is to rule on matters properly brought before us under the PUA, unless our jurisdiction is clearly divested by court order or statute. The requisite intent of Congress is not evident to us in this instance.

The District also disagrees with the IEPA's issuance of permits to Rockwell, arguing that the permits are in direct conflict with the CWA and that the Commission should refuse to act on the Petition before it for this reason. This is the wrong forum for that argument. We have no authority to reevaluate the decisions of the IEPA in its area of expertise. We are charged only with the enforcement the PUA and its regulations. The record indicates that Rockwell has met the standards established under the PUA for the issuance of a Certificate of Public Convenience and Necessity. That is our only concern.

We reject the District's arguments. Furthermore, the District failed to incorporate replacement language in its Briefs on Exceptions. Replacement language is mandatory under Section 200.830(b) of the Commission's Rules of Practice. We are therefore required to strike the District's Briefs on Exceptions from the record. We also deny the District's request for oral argument contained in its Brief on Exceptions.

VII. Findings and Ordering Paragraphs

The Commission, having considered the entire record herein, is of the opinion and finds that:

- (1) Rockwell Utilities, LLC is requesting a Certificate to provide water and sewer service to the public in certain portions of the State of Illinois, including areas in the Village of Lakemoor in Lake County and, as such, is

a public utility within the meaning of Section 3-105 of the Act, 220 ILCS 5/3-105;

- (2) the Commission has jurisdiction over Rockwell Utilities, LLC and of the subject matter of this proceeding;
- (3) the facts recited and conclusions reached in the prefatory portion of this Order are supported by the record and are hereby adopted as findings of fact and law;
- (4) for the reasons indicated above, issuance of a Certificate of Public Convenience and Necessity to provide water and sewer service for the area certificated below will promote the public convenience and is necessary thereto, as will the construction of water and sewer facilities described above, and the requirements of Section 8-406(b) of the Act have been met with respect thereto;
- (5) the Rates, Rules, Regulations, and Conditions of Service tariffs as discussed here for water and sewer service shall be applicable;
- (6) the issuance and sale of Bonds or Notes, all in an aggregate outstanding principal amount not to exceed \$3,200,000, as described herein, pursuant to Section 6-102(a) of the Act and is hereby approved;
- (7) in accordance with Section 6-101 of the Act, Rockwell Utilities, LLC should cause Identification NO. 6443 to be placed upon the face of each Bond issued pursuant to the consent and approval granted herein;
- (8) Rockwell Utilities, LLC is required to pay a fee of \$7680 in accordance with Section 6-108 of the Act; this fee shall be paid no later than thirty (30) days after service of the Commission Order; and
- (9) Rockwell Utilities, LLC should comply with the reporting requirements of 83 Ill. Adm. Code 240.
- (10) Rockwell should comply with Staff's recommendation to provide reports of actual financial information;
- (11) a Certificate of Public Convenience and Necessity to provide water and sewer service should be granted to Rockwell Utilities, LLC as described below, subject to the conditions set forth herein;
- (12) as a condition of the certificate granted herein, Rockwell Utilities, LLC shall comply with all determinations contained above and below.

- (13) Rockwell and Kirk are affiliated interests as defined in Section 7-101(2) of the Act; and, Rockwell and Rockwell Place, LLC are affiliated interests as defined in Section 7-101(2) of the Act;
- (14) The Affiliate Service Agreement, the Operating Agreement of Rockwell Utilities, LLC and the Water and Sewer Service Agreement between Rockwell and Rockwell Place, LLC are reasonable and in the public interest and should be approved and consented to by the Commission.

IT IS THEREFORE ORDERED that pursuant to Section 8-406 of the Act, Rockwell Utilities, LLC is hereby granted a Certificate of Public Convenience and Necessity as follows:

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

IT IS HEREBY CERTIFIED that the public convenience and necessity require the construction, operation and maintenance of a public water supply and distribution system by Rockwell Utilities, LLC, and the provision of water service to the public in connection therewith, in an area in Lake County, Illinois as shown on a map identified as Rockwell Exhibit JPC 5.2 and as described in Rockwell Exhibit JPC 5.1. The public convenience and necessity require the construction, operation and maintenance of a public sewer system by Rockwell Utilities, LLC, and the provision of sewer collection and treatment services by Rockwell Utilities, LLC in an area in Lake County, Illinois as shown on a map identified as Rockwell Exhibit JPC 5.2, and as described in Rockwell Exhibit JPC 5.1.

IT IS FURTHER ORDERED that until a determination in a future rate proceeding, depreciation rates consistent with a fifty year service life for utility plant and a ten year service life for water meters shall be applicable to water supply and distribution system maintained by Rockwell Utilities, LLC.

IT IS FURTHER ORDERED that Rockwell Utilities, LLC shall file the actual journal entries to separately identify accumulated depreciation amounts related to each plant account with the Chief Clerk of the Commission with a copy to the Manager of the Accounting Department within 6 months of the Commission's Final Order in this proceeding.

IT IS FURTHER ORDERED that until Rockwell files for a rate proceeding, Rockwell is required to provide reports to the Chief Clerk of the Commission with a copy to the Manager of Accounting of actual financial information for each 6-month period ending June 30th and each 12-month period ending December 31st including, but not limited to, aggregated plant investment, revenues, direct expenses, allocated expenses, Contributions in Aid of Construction received, number of customers, the status of

construction projects, a schedule of services provided by Kirk to Rockwell and the charges related to each of the listed services in the affiliate agreement.

IT IS FURTHER ORDERED that the rates for water and sewer service shall be those approved in this Docket in the Interim Order at 4, paragraph (2) until the Commission makes a revenue requirement determination in a subsequent rate proceeding.

IT IS FURTHER ORDERED that Tariff sheets reflecting these rates shall be filed within five days of this Order.

IT IS FURTHER ORDERED that as a condition of this Order, Rockwell Utilities, LLC, shall comply with the numbered findings above and all determinations made in this Order.

IT IS FURTHER ORDERED that approval is hereby granted to Rockwell Utilities, LLC to execute and perform the Affiliate Service Agreement, the Operating Agreement of Rockwell Utilities, LLC and the Water and Sewer Service Agreement between Rockwell and Rockwell Place, LLC with Kirk and Rockwell Place, LLC (as filed as Attachments "F", "G", and "H" of the Revised Amended Petition and further modified by the agreement of Staff and Rockwell as set forth herein).

IT IS FURTHER ORDERED that the Briefs on Exceptions filed by the Northern Moraine Wastewater Reclamation District are stricken from the record pursuant to Section 200.830(b) of the Commission's Rules of Practice.

IT IS FURTHER ORDERED that the Northern Moraine Wastewater Reclamation District's request for oral argument is denied.

IT IS FURTHER ORDERED that, subject to the provisions of Section 10-113 of the Illinois Public Utilities Act and 83 Ill. Adm. Code 200.880, this Order is final; it is not subject to the Administrative Review Law.

By Order of the Commission this 15th day of August, 2007.

(SIGNED) CHARLES E. BOX

Chairman

September 28, 2007

Rockwell Utilities, LLC	:	
	:	06-0522
Petition for a Certificate of Public	:	
Convenience and Necessity to provide	:	
water and sanitary sewer service to parcels	:	
in Lake County, pursuant to Section 8-406	:	(Cons.)
of the Public Utilities Act.	:	
Rockwell Utilities, LLC	:	
	:	06-0523
Petition for a Certificate of Public	:	
Convenience and Necessity to provide	:	
water and sanitary sewer service to parcels	:	
in Lake County, pursuant to Section 8-406	:	SERVED ELECTRONICALLY
of the Public Utilities Act.	:	

NOTICE OF COMMISSION ACTION

TO ALL PARTIES OF INTERSET:

Notice is hereby given that the Commission in conference on September 26, 2007, DENIED the Northern Moraine Wastewater Reclamation District's Application for Rehearing, filed on September 14, 2007.

Related memoranda will be available on our web site (www.icc.illinois.gov/e-docket) in the docket number referenced above.

Sincerely,

Elizabeth A. Rolando
Chief Clerk

EAR:ml
Administrative Law Judges Haynes & Hilliard

cc: Accounting
Ms. Hathhorn
Mr. Struck
Ms. Everson

Ms. Freetly - Finance
Mr. Luth - Rates
Mr. Johnson - Water

Service List - 06-0522c

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07-1080

07-1080

NO. _____
 IN THE APPELLATE COURT OF ILLINOIS
 FOR THE SECOND DISTRICT

FILED

OCT 25 2007

ROBERT J. MANGAN, CLERK
 APPELLATE COURT 2nd DISTRICT

Northern Moraine Wastewater
 Reclamation District,

Petitioner,

v.

Illinois Commerce Commission,
 Rockwell Utilities, LLC,

Respondents.

Petition for Review
 of Order of the
 Illinois Commerce Commission
 in ICC Docket Nos. 06-0522 and
 06-0523 (consolidated)

RECEIVED

OCT 25 2007

NOTICE OF FILING OF PETITION FOR REVIEWROBERT J. MANGAN, CLERK
 APPELLATE COURT 2nd DISTRICT

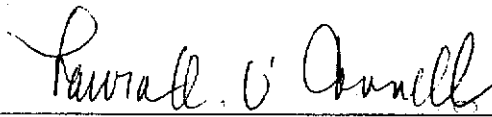
TO: All Parties on the Attached service List

PLEASE TAKE NOTICE that pursuant to Supreme Court Rule 335, the attached Petition for Review of Northern Moraine Wastewater Reclamation District was filed in the Appellate Court of Illinois for the Second District on the 25th day of October 2007, with respect to the Order on Rehearing issued by the Illinois Commerce Commission ("Commission") on September 28, 2007 and the related Final Order of the Commission entered on August 15, 2007 in Commission Docket Nos. 06-0522 and 06-0523 (consolidated).

DATED this 25th Day of October, 2007.

NORTHERN MORAIN WASTEWATER
 RECLAMATION DISTRICT

By:



KATTEN MUCHIN ROSENMAN LLP

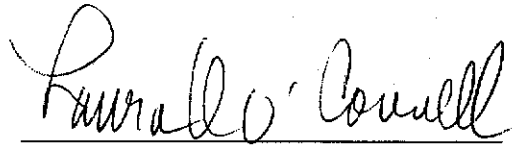
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 COURT CLERK

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CERTIFICATE OF SERVICE

I, Laura A. O'Connell, an attorney, certify that I caused a copies of the following documents to be served upon the parties identified on the attached Service List by U.S. mail, (postage prepaid) before 5:00 p.m. on October 25, 2007:

1. Notice of Filing of Petition for Review
2. Petition for Review
3. Notice of Filing of Written Notice of Appeal
4. Written Notice of Appeal
5. Docketing Statement



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